

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of) CC Docket No. 99-35
) Transmittal No. 76
Long-Term Telephone Number) DA 99-475
Portability Tariff Filings of)
Sprint Local Telephone Companies)

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REPLY OF TIME WARNER TELECOM

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REPLY OF TIME WARNER TELECOM

Time Warner Telecom Holdings Inc. d/b/a Time Warner Telecom ("TWTC") hereby files this Reply to the opposition¹ filed by Sprint Local Telephone Companies ("Sprint") in the above-referenced proceeding.

DISCUSSION

In its Petition,² TWTC demonstrated that the Commission's decision to allow Sprint's LNP Transmittal No. 76 to go into effect without first investigating the reasonableness of Sprint's imposition of default query charges on calls to numbers in NXXs with no ported numbers ("non-porting NXXs") should be reconsidered. Sprint's Opposition does not, and cannot, offer any justification for the Commission's decision.

¹ See Reply of Sprint Local Telephone Companies, filed in Long-Term Telephone Number Portability Filings of Sprint Local Telephone Companies, CC Dkt. No. 99-35, Trans. Nos. 72, 73 & 76 (Apr. 19, 1999) ("Sprint Opposition"). As Sprint never served TWTC, TWTC is filing its Reply on April 29, as if Sprint had served TWTC by first-class mail. See 47 CFR §§ 1.106(g), 1.4(h) and example 11.

² See TWTC Petition for Reconsideration, filed in Long-Term Telephone Number Portability Tariff Filings of Sprint Local Telephone Companies, CC Dkt. No. 99-35, Trans. Nos. 72, 73 & 76 (Apr. 7, 1999) ("Petition").

Apparently recognizing that it cannot prevail on the substance, Sprint relies in the first instance on the procedural argument that TWTC should not be allowed to object to Sprint's tariff now since it did not file a petition to suspend or reject the tariff and has not offered a "good reason why it was not possible for [TWTC] to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). In so arguing, Sprint blithely ignores the rationale for Section 1.106(b)(1), which is to prevent parties from unnecessarily delaying proceedings and wasting administrative resources by waiting until the reconsideration round to raise new arguments. But this is not a concern here since AT&T, in its petition to reject or suspend, raised precisely the same arguments raised by TWTC in its Petition. Moreover, TWTC has raised the problem of default query charges on calls to non-ported NXXs in comments and ex partes in the Commission's LNP rulemaking proceedings as well as in other tariff proceedings.³

Furthermore, Sprint has failed to meet the exacting standard for compliance with procedural rules that it urges the Commission to apply to TWTC. Sprint failed to provide notice of its filing by omitting any reference to Transmittal No. 76 in its caption, and, more importantly, by neglecting to serve TWTC, as is

³ See, e.g., TWTC Opposition to Direct Cases, filed in Long-Term Telephone Number Portability Tariff Filings of Southwestern Bell Telephone Company (Trans. No. 2745) and Pacific Bell (Trans. No. 2029), CC Dkt. 99-35 (Apr. 19, 1999); Ex Parte Submission by Time Warner Communications Holdings Inc., CC Dkt. No. 98-14 (Mar. 18, 1998).

required by Section 1.106(g) of the Commission's rules. TWTC downloaded the Sprint pleading from the Commission's web page, thus preventing any prejudice. Thus, the point here is not to ask that Sprint's pleading be rejected. Given that the (or at least the most important) purpose of the notice requirements (making sure other parties have an opportunity to respond) is not a concern, it would be inappropriate for the Commission to reject Sprint's pleading just as it would be an absurd elevation of procedural form over substance to reject TWTC's Petition. The question of when default query charges may be imposed has significant implications for local competition. Rote application of procedural rules should not prevent the Commission from considering this issue where the underlying rationales for the procedural rules are not implicated. Indeed, the Commission may waive its own rules in just such situations. See 47 C.F.R. § 1.3.

Sprint's filing is as weak on the substance as it is on procedure. First and foremost, Sprint does not justify the Commission's failure to explain why it was reasonable to terminate the investigation of Sprint's tariff which contained provisions substantively indistinguishable from provisions in SWBT's and PacBell's LNP tariffs that have been set for investigation.⁴ It is a bedrock principle of administrative law

⁴ See Long Term Telephone Number Portability Tariff Filings of Pacific Bell, Southwestern Bell Telephone Co. et al., CC Dkt. No. 99-35, *Order Designating Issues for Investigation* ¶ 46 (rel. Feb 26, 1999).

that agencies may not treat identical practices differently without explaining why it is reasonable to do so.⁵

Although Sprint suggests otherwise, see Sprint Opposition at 3, the Commission did not even address Sprint's practice of unnecessarily charging for queries to non-ported NXXs. In the Sprint Reconsideration Order,⁶ the Commission simply stated that "Sprint has adequately responded to the issues raised in the Sprint Suspension Order."⁷ Yet, in contrast to the Commission's order suspending SWBT's and PacBell's LNP transmittals, the Suspension Order⁸ includes no mention of query charges for calls to non-ported NXXs.

⁵ See 5 U.S.C. § 706(2)(A); Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985) (remanding decision for FAA's failure to offer coherent explanation for disparate application of legal standard for granting noise exemptions to similarly-situated airline carriers); Freeman Engineering Assoc., Inc. v. FCC, 103 F.3d 169 (D.C. Cir. 1997) (remanding decision for FCC's disparate application of "pioneer's preference" standard to two similarly-situated entities); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute").

⁶ See Long-Term Telephone Number Portability Tariff Filings of Sprint Local Telephone Companies, CC Dkt. No. 99-35, Trans. No. 76, *Reconsideration of Decision to Suspend and Investigate Tariff Filings of Sprint Local Telephone Companies* (rel. Mar. 8, 1999) ("Sprint Reconsideration Order").

⁷ See id. ¶ 4.

⁸ Long-Term Telephone Number Portability Tariff Filings of Sprint Local Telephone Companies, CC Dkt. No. 99-35, *Memorandum Opinion and Order* (rel. Feb. 5, 1999) ("Sprint Suspension Order").

Furthermore, Sprint's astonishing assertion that TWTC has not been adversely affected by Sprint's transmittal is patently false. The plain fact is that TWTC has already received bills from Sprint for tens of thousands of dollars for unnecessary default queries. It is hard to see how this is not an adverse effect. Nevertheless, Sprint asserts that "carriers like Time Warner" have brought such charges on themselves by making unnecessary LNP requests for Sprint switches, thus causing Sprint to incur upgrade expense where no numbers are ported. See Opposition at 4-5. TWTC has in fact been careful to request LNP only where it plans to enter the market. In any event, other carriers' approach to requesting LNP in certain switches does not alter the Commission's policy that costs associated with LNP-related switch upgrades should be limited to the extent necessary.⁹ If the bona fide request process is not working, Sprint should ask the Commission to fix it. It should not compound the problem by forcing TWTC to pay for its LNP upgrade costs.

Nor is it true that Sprint is opening NXXs in a manner that is consistent with industry procedures, and that TWTC's position concerning default queries to non-porting NXXs is "contrary to the stance taken by competitive carriers in industry forums on this issue." See Sprint Opposition at 6. As TWTC has explained at

⁹ See Telephone Number Portability, CC Dkt. No. 95-116, RM-8535, First Memorandum Opinion and Order on Reconsideration at ¶ 59 (rel. March 11, 1997) (limiting incumbent LECs' number portability obligations to requested switches to prevent unnecessary LNP expenditures).

some length in the LNP proceeding and in its Petition, Sprint's attempt to impose premature query charges on N-1 carriers is not consistent with industry standard procedures. While it was always contemplated that carriers could choose to update triggers and open routing tables before a number is ported in an NXX, the industry standard procedures provide a five-day window for such upgrades once a number is ported in a particular NXX. Contrary to Sprint's assertions, TWTC is unaware of any CLEC "insisting" that "once a switch is LNP capable, all NXXs associated with that switch be opened." See Sprint Opposition at 6. TWTC is also unaware of any ILEC (including Sprint) discussing during the standards setting process the possibility of charging for default queries to non-ported NXXs.

More fundamentally, there is no sound policy basis for allowing an ILEC to force N-1 carriers to adopt the ILEC's schedule for incurring LNP upgrade costs. Sprint justifies its charges, in part, by arguing that TWTC has many options to avoid Sprint's unnecessary default query charges. See Sprint Opposition at 8-9. While Sprint is correct that TWTC could elect to needlessly expend its resources any number of ways to avoid paying Sprint for unnecessary queries, there is no reason why N-1 carriers should be forced to do so. The larger issue that Sprint side-steps is that Sprint's premature LNP upgrades dictate the pace at which N-1 carriers must implement LNP and thereby unnecessarily raise Sprint's rivals' costs. The issue is not, as Sprint would have the Commission believe, how TWTC should absorb

premature LNP implementation costs, it is whether TWTC must absorb them at the time Sprint chooses to do so.¹⁰

Moreover, Sprint offers no explanation as to why it could not have made its end office switches LNP-capable and waited for a number to be ported in an NXX before performing this function on tandem switches. As TWTC has explained many times, this approach largely eliminates the problem of unnecessary default query charges.¹¹ In the absence of any explanation from Sprint as to why it did not wait to upgrade its tandem switches, the Commission must assume that Sprint simply chose not to adopt this approach. Sprint must not be allowed to force TWTC and other CLECs to pay the consequences for performing its LNP translations inefficiently.

Of course, the most inescapable evidence that charging for default queries on calls to non-ported NXXs is unnecessary and unreasonable is that Ameritech, Bell Atlantic and NYNEX have declined to do so. Sprint tries to distinguish itself from these ILECs by arguing that, since "the BOCs tend to serve the more densely populated areas of the country, it is quite likely that

¹⁰ As it did in the Description and Justification accompanying Transmittal No. 72, Sprint asserts that beginning to charge for default queries after an NXX has been listed in the LERG as portable "eliminates any confusion over precisely when the [default query] charge is effective." See Sprint Opposition at 7. But as TWTC explained in its Petition, the industry already has a procedure for determining when default queries need to be performed and most other ILECs have voluntarily adopted that approach because it is more than adequate.

¹¹ See Ex Parte Submission by Time Warner Communications Holdings Inc., CC Dkt. No. 98-14 (Mar. 18, 1998).

they are experiencing a higher percentage of ported numbers than is Sprint." See Sprint Opposition at 9. But the fact that Sprint serves sparsely populated areas subject to no competition where it has no LNP upgrade responsibilities is irrelevant to this inquiry. It is only the areas that are densely populated enough to attract competition that will be subject to LNP upgrade requests (at least initially). Thus, the areas where Sprint receives LNP upgrade requests should be no different demographically and geographically than is the case with other carriers. Nor is there any reason to believe (and Sprint has supplied none) that the bona fide request process will be more subject to abuse in densely populated areas in Sprint's region than in similar regions served by Ameritech, Bell Atlantic and NYNEX.

Orlando, the area where TWTC has been billed by Sprint for default query charges on calls to non-ported NXXs, illustrates the point. Orlando is a densely populated area that is also served by GTE, just the kind of large ILEC from which Sprint seeks to differentiate itself. Furthermore, Ameritech, Bell Atlantic and NYNEX have implemented LNP in metropolitan statistical areas ("MSAs") that are similar to Orlando without imposing unnecessary default query charges. According to the FCC, Orlando ranks as number 40 among MSAs in population. Columbus (#38, Ameritech), Norfolk (#32, Bell Atlantic) and Buffalo (#44, NYNEX) all are in the Ameritech, Bell Atlantic and NYNEX service areas, have roughly the same population, and are subject to mandatory LNP upgrades under the Commission's LNP

implementation schedule.¹² Sprint has not even attempted to explain why the Orlando MSA, or any of the areas in which it has received LNP requests, are situated differently than other incumbents' MSAs such that Sprint should be permitted to implement LNP in a unique manner.

¹² See Telephone Number Portability, CC Dkt. No. 95-116, RM-8535, *First Memorandum Opinion And Order On Reconsideration* at Appendix E (rel. Mar. 11, 1997) (ranking each of top 100 MSAs by population).

CONCLUSION

For the reasons explained above, and set forth in TWTC's Petition, the FCC should reconsider its decision to allow Sprint's Transmittal No. 76 to go into effect. The Commission should reject the Sprint LNP transmittal or suspend the transmittal, and set for investigation the question of whether it is reasonable for Sprint to charge for default queries on calls to non-ported NXXs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carmen D. Minor, do hereby certify that on this 29th day of April, 1999, copies of the foregoing "Reply of Time Warner Telecom" were hand delivered and/or mailed by federal express to the following parties:

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